Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants,,

v.

LAPIDUS POPCORN, INC.,
Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

MOTION TO DISMISS APPEAL

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A Professional Corporation
423 Washington Street, 4th Floor
San Francisco, CA 94111
(415) 788-7210
[Additional Counsel Appear on Signature Page]
Counsel for Appellee Lapidus Popcorn, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

13PP

QUESTION PRESENTED

This appeal was taken from a decision of the California Court of Appeal affirming the trial court's order overruling Defendants-Appellants' demurrer to this state antitrust action. Thus, the only question presented here is:

> Whether the Court of Appeal's opinion in *Crown Oil Corporation v. Superior Court,* 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986) deciding that Appellants' *Illinois Brick* demurrer to an indirect-purchaser Cartwright Act case presents a substantial Federal question, should be reviewed by this Court?

DESIGNATION OF CORPORATE RELATIONSHIPS

Lapidus Popcorn, Inc. has no parent company and does not have an ownership interest in any subsidiary.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DISMISSING THE APPEAL	2
A. The appeal should be dismissed for lack of finality	2
B. The California Court of Appeal did not decide the due process issue	3
1. The Court of Appeal's decision is not a final judgment on the federal issue for purposes of state court proceedings	4
2. Review of the Court of Appeal's opinion would not preclude further litigation	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

	Page
Agency Rent-A-Car, Inc. v. Connolly, 686 F.2d 1029 (1st Cir. 1982)	7
Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983)	6
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	6
California v. Zook, 336 U.S. 725 (1949)	4, 7
Cities Service Co. v. McGrath, 342 U.S. 330 (1952)	5
Clark v. Kansas City, 172 U.S. 334 (1899)	3
Colorado Anti-discrimination Commission v. Continental Airlines, 372 U.S. 714 (1962)	7
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975)	4, 5
Crown Oil Corporation v. Superior Court, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986)	3, 4
Flynt v. Ohio, 451 U.S. 619 (1981)	4
Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co., 467 U.S. 622 (1984)	5, 7
Illinois Brick v. Illinois, 431 U.S. 720 (1977)	2, 4, 6
In Re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979)	4
McComb v. Commissioners, 91 U.S. 1 (1876)	3
Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892)	3
Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573 (3rd Cir. 1979)	4
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	2
Radio Station WOW v. Johnson, 326 U.S. 120 (1945)	3
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	5, 7
Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961)	5

Other

21 Cong. Rec. 2457 (1890)	6

No. 86-287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CROWN OIL CORPORATION, GRANEX CORPORATION, U.S.A. and PAN-PACIFIC COMMODITIES,
Appellants.,

v.

LAPIDUS POPCORN, INC.,
Appellee.

On Appeal from the Court of Appeal of the State of California After Denial of Review by the Supreme Court of California

MOTION TO DISMISS APPEAL

COUNTERSTATEMENT OF THE CASE

In September 1984, Plaintiff-Appellee, Lapidus Popcorn, Inc. ("Lapidus") filed suit against Defendants-Appellants, Crown Oil Corporation, Granex Corporation, U.S.A. and Pan-Pacific Commodities, alleging a price-fixing conspiracy in violation of both California's antitrust laws (Business and Professions Code, Section 16700, *et seq.*), and its unfair business practices statutes (Business and Professions Code, Section 17200, *et seq.*).

As Lapidus did not purchase coconut oil directly from any defendant, Appellants demurred to the complaint, claiming that the California Superior Court lacked jurisdiction to hear the suit and that the complaint failed to state a cause of action. According to Appellants, to the extent that California's antitrust act permits

indirect-purchaser suits, it conflicts with, and is preempted by, this Court's decision in *Illinois Brick v. Illinois,* 431 U.S. 720 (1977). Moreover, Appellants claim that these California code sections unduly burden interstate commerce.

On May 9, 1985, the trial court entered an order overruling Appellants' demurrer. Appellants' Appendix, p. 12.

The California Court of Appeal initially denied Appellants' petition for mandate. Appellants' Appendix, p. 15. The California Supreme Court instituted the Court of Appeal to hear that petition. Appellants' Appendix p. 16. The Court of Appeal then heard argument and filed the opinion under consideration here. The California Supreme Court subsequently denied Appellants' petition for review after the judgment of the Court of Appeal had been entered. Appellants' Appendix p. 18-19.

Appellants' now seek review of the Court of Appeal's decision in this Court, incorrectly claiming that a substantial federal question is presented.

REASONS FOR DISMISSING THE APPEAL

A. The Appeal Should Be Dismissed for Lack of Finality

Both Title 28 U.S.C. sections, 1257 and 2103, require that the judgment or decree of the highest state court respecting the federal question be final before this Court can entertain an appeal from such an order. As noted in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973), this finality requirement serves ends relating to judicial economy, comity, and federalism because:

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

The Court of Appeal's February 14, 1986 decision affirming the Superior Court's order overruling Appellants' demurrer is not a final order. Finality is lacking where the court overrules a demur-

rer and orders that an answer be filed. *Clark v. Kansas City,* 172 U.S. 334 (1899); *Meagher v. Minnesota Thresher Mfg. Co.,* 145 U.S. 608, 610-611 (1892); *McComb v. Commissioners,* 91 U.S. 1 (1876); For this reason alone, Lapidus respectfully suggests that this Court should dismiss this appeal.

B. The California Court of Appeal Did Not Decide the Due Process Issue

The Court of Appeal held that Appellants had not demonstrated that California's remedy for antitrust violations was preempted by the federal remedy articulated in *Illinois Brick,* and, therefore, left undecided the subsidiary and related due process challenges raised by Appellants in their demurrer. The potential for multiple liability claimed by Appellants could not be litigated at the pleading stage of this case. Any such ruling would constitute "sheer speculation" by the courts and would constitute an impermissible "advisory opinion." *Crown Oil Corporation v. Superior Court,* 177 Cal. App. 3d 604, 223 Cal. Rptr. 164, 169 (1986). Consequently, without a record, the Court of Appeal stated it was premature to consider the due process component of Appellants' preemption claim. *Id.* at 169-170.

Notwithstanding the special concerns of federalism and comity, review of the preemption decision when the related federal due process issue has been left unresolved makes appellate review by this Court at this juncture inappropriate. Justice Frankfurter cautioned against such piecemeal appeals in *Radio Station WOW v. Johnson,* 326 U.S. 120, 127 (1945) stating:

> Of course, where the remaining litigation may raise other federal questions that may later come here . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews.

Despite this apparent facial lack of finality, Appellants suggest that review by this Court is appropriate as the *Crown Oil* decision "involves a direct assault upon the important federal policies recognized in this Court's decision in *Illinois Brick*. . . ." Appellants' Jurisdictional Statement p. 7 fn. 3.

Of course, that is not the issue. The only issue here is whether the *Crown Oil* decision has the requisite finality and, if so, whether a substantial federal question is presented, both of which are lacking here.

1. The Court of Appeal's Decision Is Not a Final Judgment on the Federal Issue for Purposes of State Court Proceedings

The first category invoked by Appellants permits federal appellate review of a state court judgment which is a "final judgment on the federal issue for purposes of state court proceedings," and there is "no probability of piecemeal review with respect to federal issues." *Flynt v. Ohio,* 451 U.S. 619, 621 (1981); see also, *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975).

Only one aspect of the preemption challenge to the complaint was resolved by the California Court of Appeal. Following this Court's precedent, the Court of Appeal first found that it was not the intention of Congress to preempt the field of antitrust enforcement. *Crown Oil, supra,* 223 Cal. Rptr. at 167-68. Furthermore, the Court of Appeal found no conflict between the federal and state statutes concerning conduct condemned under the Sherman Act and the Cartwright Act. *Id.* 167-68 (citing *Alton Box Board Co. v. Esprit de Corp.,* 682 F.2d 1267, 1274 fn.11 (9th Cir. 1982)).

Certain indirect-purchaser remedies survived this Court's decision in *Illinois Brick.* "Cost-plus" pricing to customers, as well as indirect purchasers who buy products from producer-owned or controlled direct purchasers, may still institute federal Sherman Act suits. *Illiniois Brick, supra,* 431 U.S. at 135-36 and fn.16. Indirect purchasers may also maintain actions for injunctive relief. *In Re Beef Industry Antitrust Litigation.* 600 F.2d 1148, 1167 (5th Cir. 1979); *Mid-West Paper Products Co. v. Continental Group,* 596 F.2d 573, 589-594 (3rd Cir. 1979). Thus, in indirect-purchaser actions, a potential conflict arises only when comparing federal and state remedies with respect to damages.

That an offense against both state and federal statutes might draw separate prosecutions and differing penalties from each is not evidence of federal preemption, as Appellants urge. *California*

v. Zook, 336 U.S. 725, 730-31 (1949). Using the more recent, and far more complex statutory schemes in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) and *Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co.*, 467 U.S. 622 (1984), the California Court of Appeal concluded that the Cartwright Act's remedy for antitrust violations did not conflict with the federal remedy.

Left unresolved was the related due process challenge raised by Appellants under the so-called "common fund" theory.[1] This issue, derivative of the preemption claim, was not decided by the Court of Appeal. A ruling on this due process claim could not and should not be made in a hypothetical vacuum. To date, no California court has had the opportunity to fashion a method for assessing damages for indirect-purchaser Cartwright Act suits.

Therefore, as the Court of Appeal's opinion did not finally resolve the due process issue, no final, substantial federal question is presented here and this appeal should be dismissed.

2. Review of the Court of Appeal's Opinion Would Not Preclude Further Litigation

The second category into which Appellants attempt to place this appeal permits interlocutory review by this Court when "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," *Cox Broadcasting, supra*, 420 U.S. at 482-83. Appellants claim that the case involves "identifiable federal statutory or constitutional

---

[1] Appellants' reliance on *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961) and *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952) distorts the holdings in these cases. Neither involves any wrongdoing by defendants. Both involve competing interests to possession of the same property. Underlying Appellants' use of these "due process" decisions is the unsubstantiated assumption that each tortious wrongdoing should produce only one fund from which injured parties can claim. That assumption ignores the fact that antitrust law is derived from intentional tort law. Consequently, the wrongdoer is responsible for payment to anyone foreseeably injured, not merely for creation of some single fund created by the overcharge.

policies which would [be] undermined by the continuation of the litigation in the state courts."

No federal statutory or constitutional policies are being undermined by the prosecution of this indirect-purchaser suit.

Neither the Sherman Act nor the Clayton Act precludes indirect-purchaser suits. As a rule of judicial economy, this Court's *Illinois Brick* opinion concluded that "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under Section 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge. . . ." *Illinois Brick, supra,* 431 U.S. at 746.

This Court's decision was neither a rule of standing, nor a decision of constitutional proportions. *Id.* at 728 fn.7; see also *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535 fn.31 (1983). *Illoinis Brick* was a decision concerning statutory construction only. *Id.* at 736. This Court apparently determined that ordinarily the indirect purchaser theory of damages should not be imposed on the federal judiciary. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 475 fn.11 (1982); *Associated General Contractors of California, supra,* 459 U.S. at 544 fn.51.

Illinois Brick did not vitiate a states' authority to permit their courts the opportunity to fashion damage remedies for indirect-purchaser actions brought under state statutes.

The legislative history of the Sherman Act, 15 U.S.C., Section 1, reveals that the Act's sponsor, Senator Sherman, did not intend it to preempt state antitrust laws:

> This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to *supplement the enforcement of the established rules of the common and statute laws by the several states* in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power, that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. . . . 21 CONG. REC. 2457 (1890) (Statement of Senator Sherman) (emphasis added).

Where the federal and state governments have concurrent power to regulate the same conduct, state laws providing a cumulative, different or harsher remedy are not preempted unless the states' power to fashion a remedy has been specifically withdrawn by Congress. *Agency Rent-A-Car, Inc. v. Connolly,* 686 F.2d 1029, 1036-40 (1st Cir. 1982).

This is especially true where the state is acting pursuant to its traditional police powers and both regulatory schemes provide for identical standards of conduct, differing solely as to remedies. *Colorado Anti-discrimination Commission v. Continental Airlines,* 372 U.S. 714 (1962); *California v. Zook, supra.*

In *Silkwood* this Court reaffirmed this principle when it rejected the argument that the Nuclear Regulatory Commission's exclusive authority to regulate nuclear safety preempted state punitive damage recovery under tort law:

> The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. 42 U.S.C. Section 2282 (1976 ed. and Supp. V). However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

Silkwood, supra, 464 U.S. at 257; see also, *Hayfield Northern Railroad Co., Inc. v. Chicago & N.W. Transportation Co.,* 467 U.S. 622 (1984).

For these reasons Appellee respectfully suggests that this court should dismiss this appeal.

CONCLUSION

For each of the reasons stated above, Appellee respectfully suggests that this appeal should be dismissed.

Dated: September 18, 1986

FRANCIS O. SCARPULLA
Counsel of Record
SCARPULLA & SCARPULLA
A PROFESSIONAL CORPORATION
423 Washington Street, 4th Floor
San Francisco, CA 94111

MARIO N. ALIOTO
JOSEPH M. PATANE
LAW OFFICES OF
MARIO N. ALIOTO
2280 Union Street
San Francisco, CA 94123
Counsel for Appellee
Lapidus Popcorn, Inc.